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In The

Supreme Court of the United States

October Term, 1995

LAWTON M. CHILES, JR., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ARIZONA, COLORADO, AND NEW JERSEY IN SUPPORT OF PETITIONERS

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Pursuant to Supreme Court Rule 37.5, the signatory states respectfully submit this brief as *amici curiae* in support of the Petition for a Writ of Certiorari of Governor Lawton M. Chiles, Jr., and the State of Florida, et al.

INTEREST OF AMICI CURIAE

Petitioners (hereinafter collectively referred to as "Florida") request this Court to reinstate their claim against the federal government and certain of its officers for their breach of constitutional and statutory obligations to safeguard the borders of the United States from the massive immigration of aliens in violation of the laws of the United States. The issue is of urgent and substantial import to the *amici* states of California, Arizona, and New Jersey because of the tremendous burdens imposed upon the states by this illegal action. These states, along with Texas, have each brought similar actions against the federal government, and related litigation has been brought by public officials in the State of New York; in each case the federal government's motion to dismiss was granted and the appeals are pending in the United States Courts of Appeals in the Second, Third, Fifth and Ninth Circuits.[1] Each of these states is severely and adversely

[1] *Arizona v. United States, appeal pending* No. 95-15980 (9th Cir.); *California v. United States, appeal pending*, No. 95-55490 (9th Cir.); *New Jersey v. United States, appeal pending*, No. 95-5685 (3rd. Cir.); *Texas v. United States, appeal pending*, No. 95-40721 (5th Cir.); and *Padavan v. United States, appeal pending*, No. 95-6156 (2nd Cir.).

affected by the burdens of illegal immigration, which rightly should be borne by the federal government.

The *amici* state of Colorado, though not as severely impacted by the federal government's default in the control of immigration as California, Arizona, and New Jersey, has a significant interest in preventing the federal government from foisting its constitutional and statutory responsibilities generally on state governments. This Court reinvigorated the Tenth Amendment when it held that Congress cannot commandeer state officials and programs to implement federal mandates. *New York v. United States*, 505 U.S. 144, 161 (1992); *see also Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993) (Congressional ban on foreign export of state-owned timber invalid under Tenth Amendment). It simultaneously indicated that the Guarantee Clause may impose judicially enforceable obligations on the federal government vis-a-vis the states. *New York v. United States*, 505 U.S. 144, 185. Last year the Court found that the Commerce Clause delimits the federal government's constitutional power to regulate in areas traditionally left to state and local regulation. *United States v. Lopez*, ___ U.S. ___, 131 L.Ed.2d 626 (1995). And recently the Eighth Circuit held that the Constitution's nondelegation doctrine proscribes the unfettered delegation of federal power by Congress to the Executive Branch under the Indian Reorganization Act, at least when to do so would infringe upon threshold state interests. *South Dakota v. Dept. of the Interior*, 69 F.3d 878 (8th Cir. 1995). This case presents to this Court another aspect of federalism in the form of a controversy that goes to the core of the nation's constitutional structure –

the obligation of the federal government to protect individual states from the massive, unlawful invasion of immigrant aliens. Thus, the issue presented by Florida is of significant interest to every state in that the petition raises fundamental issues related to core principles of federalism.

SUMMARY OF ARGUMENT

Florida's claim raises an issue that is fundamental to the federalist structure of the nation – whether the federal government, by abdicating its exclusive constitutional and statutory duties to control immigration and the nation's borders, may foist upon states the financial burdens resulting from illegal immigration. Significantly, only a tiny minority of states must bear the vast bulk of the costs of illegal immigration resulting from the federal government's default.

Principles of federalism recognized by the Tenth Amendment, and the command of Article IV, section 4 of the United States Constitution for the federal government to guarantee each state a republican form of government and to "protect each of [the states] against invasion," create a judicially enforceable right against the federal government. That right mandates that the government take minimally adequate action to protect the states from the influx of illegal immigrants. The petition therefore, does not pose a nonjusticiable, "political question." Rather, the focus of this case is on the admitted abdication of explicit constitutional and statutory duties by Congress and the Executive Branch that only the federal

courts can remedy. More specifically, the judicial enforcement under Administrative Procedure Act, 5 U.S.C. § 701 et seq., is an appropriate remedy for the refusal of the federal government to meet its obligations to enforce immigration law.

This Court's delineation of the obligation of the federal government to the states to protect them from illegal immigration would resolve the current constitutional confrontation between the federal government and states heavily affected by the costs and consequences of illegal immigration. This case, furthermore, affords the Court an opportunity to provide necessary guidance to the other branches of the federal government regarding the constitutional crisis precipitated by illegal immigration. This is precisely the type of "important issue of federal law" that deserves to be settled by this Court. Supreme Court Rule 10.1(c).

ARGUMENT

THE ISSUE OF THE FEDERAL GOVERNMENT'S OBLIGATION TO PROTECT STATES FROM UNLAWFUL IMMIGRATION OF MASSIVE PROPORTIONS IS FUNDAMENTAL TO THE FEDERAL STRUCTURE OF THE NATION AND IS OF NATIONWIDE SIGNIFICANCE

A. The Facts Underlying this Case Reveal An Illegal Immigration Crisis of National Proportions.

For many years massive and virtually uncontrolled numbers of immigrants have entered into the United States in violation of federal law. The response of the

federal government has been episodic at best. For the most part, it has simply ignored the problem. The financial burden resulting from this illegal immigration presents a crisis to the handful of states in which almost all illegal immigrants reside. These states are forced to devote a substantial proportion of their limited fiscal and institutional resources in an attempt to solve a problem which the Constitution and Congress have indisputably left to the *federal* government to resolve.

That illegal immigration is a massive drain on the resources of the States of Florida, Arizona, California, Illinois, New Jersey, New York, and Texas is beyond dispute. *See* Clark, Passel, Zimmermann and Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States* (1994). For example, the United States Immigration and Naturalization Service (hereinafter referred to as "INS") has estimated that out of the 3.4 million illegal immigrants living in the United States in 1992, 86% were located in these seven states, and that over 1.4 million, or 43% of the national total, were concentrated in California alone; this amounted to 4.6% of California's population. *Id.* at ii and 5-6. The illegal immigrant population will increase by almost 300,000 annually, with about 125,000 of these persons settling in California. *Id.* at ii and 76.

The costs of illegal immigrants to the seven most heavily impacted states are astronomical. These states have been estimated to spend more than $471 million annually for the estimated 21,395 incarcerated illegal aliens. *Id.* at ii and at 8, Table 1.4. In California, which houses 71 percent of these incarcerated illegal aliens, the annual cost estimate is $368 million. *Id.*

Annual education costs for children of illegal immigrants for these states are estimated to exceed $3 billion. *Id.* at 11, Table 1.6. The seven most heavily-affected states estimate annual emergency services costs attributable to illegal immigration at more than $420 million. *Id.* at 13, Table 1.7. Yet these three categories of costs "are only a fraction of the total costs of undocumented immigrants." *Id.* at iv. These costs are not recouped by revenues generated from illegal immigrants.[2]

To date the federal government has done little to stem the tide of illegal immigration or relieve the burden it imposes upon the states. House Concurrent Resolution 218, entitled "Concurrent Resolution Setting Forth the Congressional Budget for the United States Government for the Fiscal Year 1995," adopted by Congress in 1994, expressly acknowledges the government's default in Section 35:

> (a) Findings. – The Congress finds that –
>
> (1) the Federal Government is solely responsible for setting and enforcing national immigration policy;

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[2] For example, the General Accounting Office estimated illegal immigration would cost California roughly $2.35 billion per year but would generate $2.4 billion in annual revenue to the federal and state governments. California, however, would receive only $1.1 billion of this revenue – with the rest going to the federal government. U.S. General Accounting Office, Illegal Aliens: Assessing Estimate of Financial Burden on California at 6 (1994), discussed in *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, Note, 108 Harvard Law Review 1643, 1645-1646 (1995).

> (2) the Federal Government has not adequately enforced immigration laws;
>
> (3) this weak enforcement has imposed financial costs on State and local governments;
>
> (4) the Federal Government has failed to investigate and prosecute Federal wage and hour violations, thus creating incentives to hire persons illegally in the United States and exacerbating the problem of illegal immigration;
>
> (5) States must incur costs for incarcerating undocumented persons convicted of State and local crimes, educating undocumented children, providing emergency medical services to undocumented persons, and providing services incidental to admission of refugees under the Refugee Admissions and Resettlement Program; and
>
> (6) the Federal Government has an obligation to reimburse State and local governments for costs resulting from the costs described in this subsection.

H.C.R. 218 [§ 35], 103d. Cong., 2d Sess., 140 Cong. Rec. H. 2998 (May 4, 1994.); 140 Cong. Rec. H. 3135-3149 (May 5, 1994); Cong Rec. S. 5628-5634 (May 12, 1994).

The President's proposed budget for fiscal year 1996 shows that for the entire nation the federal government's spending on federal immigration programs was less than $1.9 billion in 1993. Office of Management and Budget, Budget of the United States Government, Fiscal Year, 1996 at 73, Table 5-1.[3] Assistance to all the states amounted to

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[3] Excerpts of this document were attached by respondents as an addendum to the Brief for the Appellees in the Court of Appeals below.

$29 million. *Id.* For 1996, the government proposed roughly $3 billion for federal programs and a mere $550 million for state assistance. *Id.* Thus, even the *proposed* federal assistance to *all* states is less than half of what the General Accounting Office estimates are California's uncompensated annual costs alone, and less than a quarter of California's actual expenditures. *Id.*

Thus, the federal government's own findings demonstrate the utter failure of Congress and the Executive Branch to maintain the security of the nation's borders against illegal immigration. This abdication of federal responsibility has caused the states to shoulder the massive burden of illegal immigration through the appropriation of state funds to provide services to illegal immigrants and to pay for police and correctional services necessary to protect residents from the increase in crime resulting from illegal immigration.

B. Whether the Federal Government Has the Duty to Protect the States Against the Massive Influx of Immigrants in Violation of Federal Law is an Issue of Major Significance.

The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). This case presents the vital question of whether the federal government may permit individual states to "sink" under the burden of illegal immigration through a conscious decision to withhold the

resources necessary to protect those states from an invasion of illegal immigrants. This case also provides the opportunity for the Court to further define the federal government's duty to guarantee each state a republican form of government; the federal obligation to protect each of them from invasion under Article IV section 4 of the Constitution[4]; and the government's duty not to infringe upon state sovereignty protected by the Tenth Amendment of the Constitution.

These issues go to the very foundation of the structure of our government. "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The nation's federal structure is premised on the principle that a structure of dual sovereignty maximizes the freedom of the individual:

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.

United States v. Lopez, ___ U.S. ___, 131 L.Ed.2d 626, 649 (1995) (Kennedy, J., concurring). This case directly presents the question of whether the federal government

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[4] Article IV section 4's commanding language that "the United States shall" is the only instance where the United States government, by its corporate name, is given a duty in the Constitution. *See* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L.R. 513, 523 (1962).

may evade political and financial accountability for illegal immigration; and whether it may consciously leave to the states the burdens of such immigration.

The responsibility for setting of immigration policy falls within the exclusive domain of the federal government. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). This Court has recognized that federal policy toward aliens is interrelated to both the duty to maintain a republican form of government, *see Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1951), and the duty to protect the states from invasion. *See The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889). Accordingly, where the conscious and persistent failure of the federal government to enforce its policy against illegal immigration allows the massive encroachment of aliens within the borders of several states that currently exists, it follows that the government has failed to meet its obligations under Article IV, section 4.

This breach of duty also implicates the concept of state sovereignty confirmed in the Tenth Amendment. In *New York v. United States*, 505 U.S. 144, 188 (1992), this Court held that "[w]hatever the outer limits of [state] sovereignty, may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." In other words, Congress "may not conscript state governments as its agents." *Id.* at 178. The federal government's failure to meet its constitutional duty under Article IV, section 4, forces Florida and similarly-situated states to take action to address the burdens of illegal immigration. This, in effect, makes the states unwilling agents of the federal government. Florida and six other states are forced to appropriate a substantial amount of scarce *state* funds to meet the costs of

illegal immigration, thus forcing them to conform their legislative and budgetary agendas to meet obligations which are properly the responsibility of the *federal* government. This, in turn, results in the commandeering of the state's fiscal resources and legislative agenda to meet federal needs. *Cf. New York v. United States*, 505 U.S. at 185.

This case does not involve a *direct* command on the States to legislate or administer a federal program. Rather, it represents a conscious and deliberate default by the federal government to either perform its constitutional and statutory duties, or, alternatively, to assist the few states that must pay the costs of this *national* policy. That the federal government has chosen to default rather than legislate state financial responsibility is no less a derogation of state sovereignty. The federal government can violate state sovereignty in ways other than by formal command to a state to enact a certain policy or organize governmental functions in a certain way. *Cf. United States v. Lopez*, ___ U.S. ___, 131 L.Ed.2d 626, 653 (concurring opinion of Kennedy, J.).

It simply defies logic to suggest that federal immigration policy can be carried out without any consideration for the impact on sovereign states. After all, it is the states which must bear the brunt of federal policy as it concerns undocumented aliens residing in the United States.[5] This case starkly demonstrates that fundamental principles of dual sovereignty and political accountability are placed

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[5] This Court has acknowledged that a state obligation which in the abstract appears voluntary may, in fact, not be so. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

in jeopardy by the federal government's abdication of congressionally-mandated responsibility, just as certainly as if Congress had acted through coercive legislation aimed directly at the states. *Cf. New York v. United States*, 505 U.S. 144, 185 (1992).

In sum, *amici* submit the issue of whether under Article IV, section 4 and the Tenth Amendment, the federal government has the duty to protect states from illegal immigration and the effects of such illegal immigration raises a fundamental issue of federalism that needs to be resolved by this Court. Supreme Court Rule 10.1(c).

C. Florida's Claim Raises an Important Issue Regarding the Justiciability of Claims Under Article IV, § 4 of the Constitution and the Tenth Amendment.

Florida presents two claims, one constitutional and the other statutory. The former is premised on the direct obligation of the federal government to protect Florida from illegal immigration. The latter seeks declaratory and injunctive relief, alleging a failure of the United States and federal immigration officials to carry out their statutory obligation to enforce and effectively administer federal immigration laws.

While the claims presented by Florida in this case may, to some extent, be characterized as "political," the fact a case may deal with a political subject does not alone make it nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 217 (1962). While the courts are ill-equipped to formulate national policies or develop standards for matters that do

not present a legal issue, the judiciary's task is to apply traditional rules of statutory construction to determine the nature and scope of duties imposed upon federal officers and agencies. *Japan Whaling Assoc. v. American Cetacean Society,* 487 U.S. 221, 230 (1988).

In a case where a Guarantee Clause violation is alleged, it is the nature of the claim that determines whether the case is justiciable. *Cf. Baker v. Carr,* 369 U.S. at 211, 217; *Reynolds v. Sims,* 377 U.S. 533, 582 (1964). This Court in *New York v. United States,* 505 U.S. 144, 185 (1992), indicated that certain claims brought under the Guarantee Clause of Article IV section 4 of the Constitution are in fact justiciable. *See also* Merritt, *The Guarantee Clause and State Autonomy; Federalism for a Third Century,* 88 Colum. L. Rev. 1, 76 (1988).

This case raises a fundamental issue regarding the justiciability of a state claim of duty owed directly to it as a sovereign state by the federal government. The constitutional duty to protect the states from "invasion" is specific. The question for the judiciary is whether the massive influx of illegal immigrants constitutes an invasion under Article IV, section 4. That is a matter of legal interpretation. There are a number of specific statutory duties imposed upon the Attorney General and the INS related to the control of immigration. *See, e.g.,* 8 U.S.C. § 1103, subsec. (a) and (c), § 1252 subsec. (a)(2), (i), and (j). Florida's claims do not involve development of immigration policy but, rather, its enforcement. It involves an interpretation of constitutional and statutory duties – a task fully within the competence of the federal courts. *Japan Whaling Assoc. v. American Cetacean Society,* 478 U.S. 221, 230 (1988).

Moreover, this Court held in *INS v. Chadha* 462 U.S. 919, 940-941 (1983), that the plenary authority of Congress over immigration does not prevent the Court from reviewing a challenge premised on the ground that the federal government's action in the field of immigration violates another provision of the Constitution. The principle set forth in that case is directly applicable here.

The issue presented by Florida's petition is important to every state and is central to an understanding of the balance between dual sovereigns in the federal structure of our nation. The words of Justice Kennedy in *United States v. Lopez* are particularly applicable to this case:

> . . . [I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . [S]ome Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, see *Public Citizen v. Department of Justice*, 491 U.S. 440, 466, 105

> L.Ed.2d 377, 109 S.Ct. 2558 (1989); *Rostker v. Goldberg*, 453 U.S. 57, 64, 69 L.Ed.2d 478, 101 S.Ct. 2646 (1981), the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."

___ U.S. ___, 131 L.Ed.2d 626, 649-650 (Kennedy, J., concurring.)

In this case the federal balance has been tipped too far by the failure of the Legislative and Executive branches to fulfill their obligation to the states. It is apparent that this default to a large extent stems from the fact that only a small minority of states are heavily affected by illegal immigration. The political branches have proven incapable of restoring the federal balance. Judicial intervention is therefore imperative. This Court, therefore, should grant certiorari to permit further consideration of the justiciability of Florida's claims.[6]

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[6] In seeking this Court's review, Florida correctly observes that fashioning a judicial remedy in this case does not lie beyond a court's competence, and that the district court has available to it a number of remedies including declaratory relief, injunctive relief and equitable restitution. (Petition for Writ of Certiorari at 27-29.) The *amici* states will not repeat Florida's arguments here, but would underscore the point that this Court allows district courts broad discretion to remedy constitutional violations. *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976).

D. Florida's Claim Raises Important Issues Regarding The Availability of Relief Against The Federal Government Under the Administrative Procedure Act for Failing to Protect a State from Illegal Immigration.

Under the Administrative Procedure Act, specifically 5 U.S.C. § 702, a person adversely affected by agency action is entitled to judicial review. Agency action includes action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706. The Administrative Procedure Act provides for review of statutory and constitutional claims. 5 U.S.C. § 706(2)(B) and (C).

Florida's claim is that the federal government has both a constitutional and statutory duty to take action to protect it from the massive influx of illegal immigrants across its borders and that the United States is abdicating that duty by failing to effectively enforce existing immigration laws. Specifically, the Attorney General and the INS, as officers of the federal government, have expressly violated a duty owed to the states to adequately enforce immigration law and have forced Florida to take action to address the burden of illegal immigration.

In *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court held that a federal officer's decision not to enforce a law in a particular case was a discretionary act unreviewable under the Administrative Procedure Act. Critically, however, the Court in *Heckler* noted that it was not confronted with a situation where the agency has " 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833, fn. 4. This case presents a claim

with specific factual support that the federal government has adopted a policy which amounts to an abdication of statutory obligations causing a breach of an underlying constitutional duty it owes to the states. Thus, this case therefore squarely raises the issue which this Court did not need to confront in *Heckler*, but now calls for resolution.

CONCLUSION

The district court below noted that:

> [T]he State of Florida is suffering under a tremendous financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws. The State of Florida is in desperate need of relief from this overwhelming burden it is being unfairly forced to bear . . . [A]s the State of Florida has already sought relief through the political process, the State may have no other method for obtaining relief from this burden. . . .

Chiles v. United States, 487 F.Supp. 1334, 1344 (S.D. Fla. 1994), *affirmed*, 69 F.3d 1094 (11th Cir. 1995). The district court was unquestionably correct in its above-quoted factual determinations. Both it and the court of appeals, however, erred grievously in determining that Florida's claim is non-justiciable and unavailing under the United States Constitution.

Florida's petition affords this Court an opportunity to remedy those flawed holdings and, in so doing, to address an issue of federalism which is of fundamental importance to both Florida and its sister states.

For the above-stated reasons, the *amici* states urge that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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